STATE OF MICHIGAN

IN THE SUPREME COURT
525 W Ottawa, 2nd Floor
G. Mennen Williams Building
Lansing, Michigan 48933
(517) 373-0120

IN THE MATTER OF JACOB KUCHARSKI,

Minor Child, **SUPREME COURT NO.: 121410**

/

FAMILY INDEPENDENCE AGENCY, **Court of Appeals No.: 235602**

Petitioner-Appellee, **Trial Court No.: 99-0515-01 NA**

vs.

MELISSA KUCHARSKI,

Respondent-Appellant.

Peter P. Walsh (P28040)
NAPIERALSKI & WALSH, P.C.
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SUPPLEMENTAL BRIEF

(Oral Argument Requested)

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STATEMENT OF RELIEF SOUGHT

Appellant seeks to have this Court reverse the Court of Appeals and Trial Court decision and remand the case to the Trial Court for further proceedings for the purpose of reunifying Appellant and Jacob.

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STATEMENT OF QUESTIONS PRESENTED

I. CAN PARENTAL RIGHTS OF A PARENT BE TERMINATED WHEN THE PARENT HAS SUCCESSFULLY COMPLETED ALL THE TERMS OF A PARENT AGENCY AGREEMENT ON THE BASIS OF A DISPUTED LACK OF BONDING & ATTACHMENT, THAT THE AGENCY ONLY IDENTIFIED AND ADDRESSED AFTER RECOMMENDING TERMINATION?

The Trial Court Said: "Yes"

The Court of Appeals Said: "Yes"

Defendant/Appellant Says: "No"

II DID THE STATE PROVE BY CLEAR AND CONVINCING EVIDENCE THAT A LACK OF BONDING AND ATTACHMENT JUSTIFIED THE TERMINATION OF PARENTAL RIGHTS WHEN THE TESTIMONY OF THE COUNSELOR HIRED BY THE AGENCY TO RECTIFY THE ALLEGED PROBLEM DID NOT SUPPORT THE STATE'S POSITION AND THE STATE WAS FORCED TO BRING IN A HIRED GUN EXPERT ORIGINALLY CONTACTED BY THE FOSTER PARENTS WHO HOPED TO ADOPT?

The Trial Court Said: "Yes"

The Court of Appeals Said: : "Yes"

Plaintiff/Appellant Says: "No"

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PROCEDURAL HISTORY

Appellant's son Jacob was made a ward of the court on April 21, 1999. On June 15, 2001 an Amended Supplemental Petition seeing termination of parental rights was authorized. This Petition relied heavily on allegations that Appellant had failed to complete the terms of her Parent/Agency Agreement and therefore her parental rights should be terminated pursuant to M.C.L.A. 712A.2 19b (3)(c)(i). This request was subsequently abandoned and termination was sought pursuant to M.C.L.A. 712A.2 19b (3)(c)(ii), although a modified Petition was never filed. A Termination Hearing was started on January 22, 2001 and concluded on March 7, 2001. The Trial Court issued it's Opinion on March 30, 2001 and a timely Appeal of Right was sought by Appellant. The Court of Appeals issued a Memorandum Opinion affirming the trial court on March 1, 2002. A timely Motion for Reconsideration was filed and an order was entered denying the Motion on April 4, 2002. Leave to Appeal was denied in this court but after a Motion for Reconsideration, Leave to Appeal was granted on March 13, 2003.

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STANDARD OF REVIEW

Appellant believes that the Standard of Review on Question Presented I is de novo since this is a question of law. *People v. White*, 212 Mich. App. 298, 576 N.W.2d 876 (1995) Appellant believes that this court must review Question Presented II for clear error. MCR 5.974(I).

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STATEMENT OF FACTS

Appellant relies on the Statement of Facts set forth in her Application for Leave and other previously submitted pleadings. Appellant would also indicate to the Court that Appellee in it's Brief accepted Appellant's Statement of Facts except to point out the 30 years of experience of their expert witness and the fact that she conducted a "typical observation" of Appellant with her son.

Another important fact was established at the August 29, 2002 evidentiary hearing ordered by this court. The Appellee's expert Yvwaina Richardson testified that she had concerns with Jacob's speech development.

Q: You said there were some other concerns you had?

A: I had a concern with regard to his speech development, because that's an indicator. ***If there's not a biological problem with speech development***, it's usually a concern in terms of what kind of interaction that child has had with parents early on. Because children learn speech patterns from their parents and from sustained interaction with them.

Q: So what, specifically did you observe between Jacob and his mother that caused some concern in this area?

A: That his language was difficult to understand at times, and that at times the mother had as much trouble understanding him as I did.

Tr. March 7, 2001, P. 42. (Emphasis supplied)

Ms. Richardson also indicated that she was concerned that Appellant had to go and physically get Jacob several times after he did not come when she called him. (Tr. March 7,

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2001, P. 44-45)

On August 29, 2002 Lora Holewinski testified that in January of 2002 Jacob had his adenoids and tonsils removed. He also had tubes placed in his ears.

Q: And did that resolve any issues, the developmental issues that were brought up by Ken-O-Sha?

A: Yes. Jacob just ***flourished*** after he had tubes in his ears. His vocabulary ***skyrocketed*** He was much more able to interact with other children and be heard and participate in conversations. And his own, his own play became more imaginative and he would, you know how children articulate when they're talking with dolls or whatever they're playing with or specific toys. I think Buzz Lightyear is one of his toys that he's able to talk about how Buzz is, you know, a super-hero and how he enjoys him.

Tr. March 7, 2001, P. 19. (Emphasis supplied)

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LAW & ARGUMENT

STATEMENT OF QUESTIONS PRESENTED

III. CAN PARENTAL RIGHTS OF A PARENT BE TERMINATED WHEN THE PARENT HAS SUCCESSFULLY COMPLETED ALL THE TERMS OF A PARENT AGENCY AGREEMENT ON THE BASIS OF A DISPUTED LACK OF BONDING & ATTACHMENT, THAT THE AGENCY ONLY IDENTIFIED AND ADDRESSED AFTER RECOMMENDING TERMINATION?

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II DID THE STATE PROVE BY CLEAR AND CONVINCING EVIDENCE THAT A LACK OF BONDING AND ATTACHMENT JUSTIFIED THE TERMINATION OF PARENTAL RIGHTS WHEN THE TESTIMONY OF THE COUNSELOR HIRED BY THE AGENCY TO RECTIFY THE ALLEGED PROBLEM DID NOT SUPPORT THE STATE'S POSITION AND THE STATE WAS FORCED TO BRING IN A HIRED GUN EXPERT ORIGINALLY CONTACTED BY THE FOSTER PARENTS WHO HOPED TO ADOPT?

The Trial Court Said: "Yes"

The Court of Appeals Said: : "Yes"

Plaintiff/Appellant Says: "No"

Appellant relies on the law and argument previously made in her Application for Leave, Reply to Answer in Opposition to Appellant's Application for Leave, Supplemental Brief and Motion for Reconsideration, especially the Motion for Reconsideration which is attached. Appellee has filed just one Brief dated May 14, 2002. The center of their argument is on Page 4 of that Brief.

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Appellee cites the following reasons in support of their position that they have proven their case for termination by clear and convincing evidence:

1. Appellant claimed that Psychologist Dr. Vanderbeck's prognosis for the eventual return of Jacob to Appellant was guarded due to her self centered personality. This author has just again reviewed Dr. Vanderbeck's testimony and his psychological reports and transmittal letter dated August 30, 2001 all of which appear to have been admitted as Exhibit 2.(Tr. January 22, 2001, P. 36) This author can not find anything in the record that indicates that Dr. Vanderbeck's prognosis for the return of Jacob was guarded in January of 2001 or at any other time. Dr. Vanderbeck testified that Appellant was guarded and had a self centered personality but that these traits did not disqualify her from parenting a child. (Tr. January 22, 2001, P. 48-50, 53-54) In fact he was specifically asked what his prognosis was concerning these personality traits and never used the word guarded. This question and answer was part of an exchange with the assistant prosecutor in which she appears to be desperately trying to get her own witness Dr. Vanderbeck to support termination without success.

> Q: All right. But as you were saying, you can't, can you give a prognosis as to whether or not she will or will not modify those personality function and concerns that you had?
>
> A: Well, again, I, I think those personality traits will probably stay constant. But those traits alone would not disqualify her from parenting a child.
>
> Tr. January 22, 2001, P. 49.

As much as the Prosecution may try to spin, or just misrepresent, the testimony, reports and transmittal letter of Dr. Vanderbeck, the evidence indicates that his opinions and

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findings were favorable to Appellant and did not support termination.

2. Appellee claims that the testimony of their expert Yvwania Richardson which established several concerns such as Jacob's delayed speech development, lack of proximity to Appellant and non-sustained interaction. In earlier Briefs Appellant has clearly and emphatically set forth her positions concerning this hired gun witness and does not need to repeat them ad nauseam here. It is important to note however, that as indicated in the Statement of Fact to this brief, this witnesses' testimony was based on the presumption that there were no biological problems with Jacob. Now we know that there was a hearing problem severe enough that early last year Jacob had surgery to place tubes in his ears. Subsequently according to Lora Holewinski, Jacob flourished and his vocabulary skyrocketed. Isn't it obvious that some of the concerns noted by Ms. Richardson are attributable to Jacob's hearing problem, a problem that at the time of the termination hearings in early 2001 had not been diagnosed?

3. Finally the prosecution claims that the testimony of Ms. Hoogeboom should be discounted since she has no special training in Bonding and Attachment. This claim by the prosecution is false and Appellant in earlier briefs has cited to this court the evidence in the record refuting the prosecution's claim. What the prosecution meant to say was that although treating counselor Ms. Hoogeboom has some special training in Bonding and Attachment issues her level of experience was less than the 30 years of experience that the expert found for them on the other side of the state by the foster, now at risk adoptive, mother, has in this field. I am sure that if asked that this is what the prosecution meant to say since the record clearly refutes their earlier claims concerning Ms. Hoogeboom. Now, as Appellant earlier

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indicated to this Court and will again not restate at length here, this attack by the prosecution on the qualifications of Ms. Hoogeboom firmly impales the prosecution on the horns of a dilemma. The applicable statute requires the prosecution to prove by clear and convincing evidence that Appellant was given notice of a condition, a reasonable opportunity to rectify the condition and that there will be no reasonable likelihood that the condition will be rectified within a reasonable period of time. M.C.L.A. 712A19b(3)(c)(i) & M.C.L.A. 712A19b(3)(c)(ii). If the prosecution convinces this court that Ms. Hoogeboom had no training or expertise in Bonding and Attachment issues the prosecution is firmly impaled on the reasonable opportunity horn. Appellant did not diagnose herself with this condition, her caseworker, Lora Holewinski, first brought this condition up in October of 2000 and referred Appellant to Ms. Hoogeboom for treatment which started promptly thereafter in November of 2000. (Appellee kept emphasizing 22 months in their brief but the relevant period of time here is really from October of 2000 when Bonding and Attachment first came up to January of 2001 when the termination hearing starts.) If one believes the prosecution's allegations concerning the qualifications of Ms. Hoogeboom, Appellant was referred to a counselor in November of 2000 to treat this Bonding and Attachment problem who her caseworker knew or should have known was not qualified to treat her. The record here already establishes that this same caseworker also arranged the examination by Ms. Richardson in December of 2000 and that she never asked Ms. Richardson for any treatment recommendations. So the prosecution is stuck on this horn with no ability to prove by any measure of evidence that Appellant was given an opportunity to rectify the Bonding and Attachment problem. Was the 19 year old Appellant supposed to realize that Ms. Hoogeboom was not qualified to treat

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her? Was the 19 year old supposed to take it upon herself to terminate the treatment she was ordered to attend and travel 150 or so miles to Flint to treat with Ms. Richardson? What does the record show that Lora Holewinski did with the information she obtained from the Richardson examination: a very big NOTHING to help or treat Appellant. She just passed the information on to use as evidence for termination and kept requiring that Appellant treat with the allegedly unqualified Ms. Hoogeboom.

Now maybe after realizing their argument concerning the qualifications of Elaine Hoogeboom proves Appellant was treated badly by her caseworker and never given a reasonable opportunity to rectify the alleged Bonding and Attachment condition, the Prosecution may try to wiggle off that horn by admitting that Ms. Hoogeboom was qualified to treat Appellant but then they will be firmly stuck with the emphatic testimony of a qualified expert, Ms. Hoogeboom. She testified that Appellant was ready to have her child returned forthwith because after the referral for treatment in November of 2000 and through the final hearing in March of 2001, Appellant had attended every session and was interacting appropriately with Jacob. (This treatment was of course made a little more difficult since foster, now adoptive mom, failed to bring Jacob to several sessions.)

Which ever horn of the dilemma Appellee chooses leads back to the same result; termination was not appropriate.

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CONCLUSION

One other thing cries out for comment here. It is clear from the Trial Court's Opinion and Appellee's Briefs both here and below that the case for termination here was based almost entirely on the expert testimony of Yvwaina Richardson. The use of out of town experts who are paid to conduct a limited examination of the situation for purposes of testifying and not treatment may be acceptable in soft tissue auto negligence cases but does it really have a place in a termination of parental rights case? The nature of these cases is such that there are always plenty of treating experts, usually unilaterally chosen by the state or it's contract agency, available to testify whether they be psychologists, social workers, rehabilitation counselors, etc. Of course there may be situations where another opinion would be helpful to determine a course of treatment but it is clear from the record here that Ms. Richardson was brought in at the behest of the foster, now adoptive, mother just to salvage a failing a case for termination, not for treatment. This court should see to it that it sends a clear message that this never happens again.

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RELIEF REQUESTED

Appellant requests that the Court of Appeals and Trial Court be reversed and that this matter be referred immediately back to the Trial Court for assistance and counseling to successfully return Jacob to the custody of the Appellant.

Respectfully Submitted,

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Dated: 3/28/03

By: _____
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